

**DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS**

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JEFFERY CARITHERS
Petitioner

v.

METROPOLITAN POLICE DEPARTMENT
Respondent

Case No.: 2011-MPD-00016

FINAL ORDER

I. Introduction

In this case, Respondent Metropolitan Police Department (“MPD”) has denied Petitioner Jeffery Carithers’s application for certification as a Security Officer because Mr. Carithers finished his probation for a criminal charge less than one year before his application. 17 DCMR 2104.1(a). However, Mr. Carithers is entitled to a hearing as to whether he meets the criteria to be a security officer. For the following reasons, I conclude that Mr. Carithers has met his burden to show his eligibility to be a security officer. 17 DCMR §§ 2102.2, 2104 and 2105.

II. Procedural History

On October 20, 2011, Mr. Carithers filed a hearing request concerning his application for a security officer certification. Mr. Carithers is appealing a denial notice issued by MPD on October 13, 2011. The basis for denial was that Mr. Carithers allegedly had completed one-year

probation for a driving under the influence of alcohol (“DUI”) charge less than one year before the application.

On October 26, 2011, a Notice of Hearing and Scheduling Order was issued, scheduling a hearing for November 14, 2011 at 10:30 AM.

The Notice of Hearing and Scheduling Order was served on the parties at their addresses of record. The Order was sent to MPD’s four listed representatives at their respective email addresses, as requested by MPD. The Order was not returned to OAH as undeliverable by the internet server. Accordingly, MPD was properly notified of the hearing date, time and location. *See Dusenbery v. United States*, 534 U.S. 161, 167-171 (2002); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800 (1983); *McCaskill v. District of Columbia Dep’t of Employment Servs.*, 572 A.2d 443, 445 (D.C. 1990); *Carroll v. District of Columbia Dep’t of Employment Servs.*, 487 A.2d 622, 624 (D.C. 1985).

The hearing was held as scheduled on November 14, 2011. Mr. Carithers appeared on his own behalf. No one appeared on behalf of MPD. Mr. Carithers requested that the hearing proceed in MPD’s absence. After determining that the Notice of Hearing and Scheduling Order had been served on MPD, I found MPD to be in default of these proceedings. OAH Rule 2818.3 (if a party fails without good cause to appear for the hearing, the judge may find the party to be in default and decide the case on the merits).

Mr. Carithers testified on his own behalf. The following exhibits were admitted into evidence:

Petitioner’s Exhibit (“PX”) 100 - Mr. Carithers’s Security Officer Application, dated September 26, 2011, with attached documents:

- (a) Letter from Kayla Porter, Probation Officer, dated October 3, 2011
- (b) Georgia State Warrant, dated January 24, 2003;
- (c) Petition for Discharge – First-Offender Act, dated May 4, 2004;
- (d) Georgia State Warrant, dated May 24, 2003;
- (e) Virginia Uniform Summons, dated June 21, 2005;
- (f) Virginia Warrant of Arrest - Misdemeanor, dated January 9, 2006;
- (g) Georgia Charge of Driving under the Influence (“DUI”), dated February 22, 2008;
- (h) Letter from Samuel L. Thompson of Securamerica, LLC, dated September 4, 2009; and
- (i) MPD Intake Survey Screening, dated October 12, 2011.

PX 101 -

Certificates of Completion of the Life Recovery Class and New Life Program at the Christian Family Center.

At Mr. Carithers’s request, the record was held open for one week, so that he could submit additional exhibits. Mr. Carithers did not submit any additional exhibits, and the record closed on November 21, 2011.

Based upon the testimony of the witness, my evaluation of his credibility, and the exhibits admitted into evidence, I now make the following findings of fact and conclusions of law.

III. Findings of Fact

Mr. Carithers has lived in Georgia for most of his life. He moved to the District of Columbia in 2011.

On August 2, 2011, Mr. Carithers completed probation for a charge of DUI in Georgia.

On September 26, 2011, Mr. Carithers filed with MPD his initial application for Security Officer certification. PX 100(a). Mr. Carithers appeared for an interview with MPD on October 12, 2011. PX 100(i).

MPD denied his application because Mr. Carithers had completed his period of incarceration (through probation) less than one year before the date of application. MPD relied upon 17 DCMR 2104.1(a).

Mr. Carithers's criminal conviction record includes the following charges: (1) January 24, 2003, Theft of Services, Georgia; (2) August 13, 2005, Reckless Driving, Virginia; (3) October 7, 2005, DUI, Georgia; (3) March 6, 2006, DUI, Virginia; (4) February 22, 2008, DUI, Virginia; and (5) May 29, 2010, DUI, Georgia.

Mr. Carithers obtained employment with Securamerica, as a security officer, pending approval of his certification by MPD. After MPD denied his application, Securamerica terminated his services.

Mr. Carithers has been clean and sober since his last DUI arrest. He successfully completed intensive courses with the Christian Life Center. PX 101.

IV. Conclusions of Law

For the following reasons, I conclude that Mr. Carithers has proven his suitability to be a security officer. I will order MPD to issue a security officer certification to Mr. Carithers.

MPD must determine the “suitability for certification” of any person who applies for a Security Officer certification. 17 DCMR § 2102.2 (Enhanced Professional Security Amendment Act of 2006). The applicant must provide information to meet certain regulatory eligibility requirements. 17 DCMR §§ 2104 and 2105.

If MPD denies an application for Security Officer certification, the applicant may request a “full hearing” on the denial from this administrative court. 17 DCMR 2120.4(e). The “full hearing” is the equivalent of a trial *de novo*, and must afford “full procedural safeguards..., including the right to be represented by ... legal counsel and the right to confront and cross-examine witnesses.” 17 DCMR 2122.7.

At the full hearing, the applicant has the burden to prove that he is “suitable” in several categories, including health and criminal history. 17 DCMR §§ 2102.2, 2103, 2104.4, and 2105.2(h). The applicant must prove that he is “suitable” by a preponderance of evidence at the full hearing. *WMATA v. Dep’t of Employment Servs.*, 926 A.2d 140, n13 (D.C. 2007).

The regulations prohibit MPD from issuing a Security Officer certification to an applicant who has been released from incarceration for a misdemeanor which involves a weapon or larceny. 17 DCMR 2104.1(a)(1). The regulations are silent as to whether MPD may issue Security Officer certification to an applicant who is on probation for a non-violent misdemeanor such as Driving While Under the Influence. 17 DCMR §§ 2104 and 2105.

With one limited exception, MPD’s licensing regulations do not explicitly state, as do other licensing regimes in Title 17, which party has the burden of proof in Security Officer certification denials. *See* 17 DCMR §§ 4115.1 and 4115.2 (assigning burden of proof in Health Occupations license); 17 DCMR §§ 2527.2 and 2527.3 (assigning burden of proof in license

matters); 17 DCMR 3134.7 (assigning burden of proof in Funeral Services Establishment license revocations). *See also* D.C. Code, 2001 Ed. § 2-509 (“[T]he proponent of a rule or order shall have the burden of proof.”)

The drafters of the MPD Security Officer certification regulations did explicitly assign the burden to the applicant for a subset of applicants who apply for certification less than one year after release from incarceration for a misdemeanor, or less than two years after release from incarceration for a felony. 17 DCMR §§ 2104.1(a)(1) and (2). For the remainder of applicants, this administrative court looks to the wording of the regulations to assist in its duty to fairly allocate burden. OAH Rule 2820.4.

In each eligibility category, MPD requires the applicant to provide evidence of suitability:

Each person applying for certification shall submit to the Mayor, under oath, the information required by this chapter as well as other information that the Mayor may require for assistance in determining the applicant’s suitability for certification.

17 DCMR 2102.2 (emphasis added).

Each applicant for certification shall be required to submit a physician’s certificate . . .

17 DCMR 2103.1 (emphasis added).

A person who is in either of the following [criminal conviction history] categories shall not be eligible for certification as a security officer unless he or she meets the burden of proving to the Office of Administrative Hearings that he or she is not a significant safety risk to the community . . .

17 DCMR 2104.1(a) (emphasis added).

In evaluating an application for a security officer certification, the Mayor shall consider:

* * *

Any information produced by the applicant, or produced on his or her behalf, in regard to his or her rehabilitation and good conduct since the occurrence of the criminal offense . . .

17 DCMR 2105.1(h) (emphasis added). This administrative court concludes from the repetition of the drafters of the regulations that first-time applicants for a Security Officer certification have the burden to prove suitability, both to MPD and to this administrative court.

MPD and this administrative court must consider all of the following factors when assessing an applicant's criminal record to determine suitability:

(a) An applicant's conviction history;

* * *

(d) The bearing, if any the criminal offense for which the person was previously convicted will have on his or her fitness or ability to perform one or more duties or responsibilities of a security officer;

(e) The time that has elapsed since the occurrence of the criminal offense ...;

(f) The age of the applicant at the time of the occurrence of the criminal offense...;

(g) The frequency and seriousness of the criminal offense; and

(h) Any information produced by the applicant, or produced on his or her behalf in regard to his or her rehabilitation and good conduct since the occurrence of the criminal offense ...

17 DCMR 2105.1. MPD and this administrative court may consider all arrests in an applicant's criminal history, including those which did not result in conviction. 17 DCMR § 2105.5.

In this case, Mr. Carithers has demonstrated that he is suitable for Security Officer certification. While his criminal record includes three prior DUI charges and a reckless driving charge, Mr. Carithers has successfully completed probation and attended sobriety courses. He has no history of violent crimes and no felony charges.

Thus, while MPD has properly determined that it is barred from issuing a security officer certification because Mr. Carithers completed probation less than one year before his application,

§ 2104.1(a), Mr. Carithers is entitled to a *de novo* hearing before OAH on his suitability to be a security officer, and he has proven his suitability.

Accordingly, the October 12, 2011 Notice of Denial of Security Officer certification is reversed. Mr. Carithers is eligible for Security Officer certification.

V. Order

Accordingly, it is this 30th day of November, 2011:

ORDERED that the Metropolitan Police Department's October 12, 2011 Notice of Denial of Security Officer certification for Petitioner Jeffery Carithers is **REVERSED**; it is further

ORDERED that Mr. Carithers is **ELIGIBLE** for Security Officer certification; it is further

ORDERED that MPD shall issue a Security Officer certification to Mr. Carithers forthwith; it is further

ORDERED that any party who wishes to file a Motion for Reconsideration of this Final Order must do so within fourteen (14) calendar days of the service of the order. *See* OAH Rule 2832.4; it is further

ORDERED that the appeal rights of any person aggrieved by this Order are stated below.

Paul B. Handy
Administrative Law Judge

After an administrative law judge has issued a Final Order, a party may ask the judge to change the Final Order and ask the District of Columbia Court of Appeals to change the Final Order. There are important time limitations described below for doing so.

HOW TO REQUEST THE ADMINISTRATIVE LAW JUDGE TO CHANGE THE FINAL ORDER

Under certain limited circumstances and within certain time limits, a party may file a written request asking the administrative law judge to change a final order. OAH Rule 2828 explains the circumstances under which such a request may be made. Rule 2828 and other OAH rules are available at www.oah.dc.gov and at OAH's office.

A request to change a final order does not affect the party's obligation to comply with the final order and to pay any fine or penalty. If a request to change a final order is received at OAH **within 10 calendar days** of the date the Final Order was filed (**15 calendar days** if OAH mailed the final order to you), the period for filing an appeal with the District of Columbia Court of Appeals does not begin to run until the Administrative Law Judge rules on the request. **A request for a change in a final order will not be considered if it is received at OAH more than 120 calendar days of the date the Final Order was filed (125 calendar days if OAH mailed the Final Order to you).**

HOW TO APPEAL THE FINAL ORDER TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Pursuant to D.C. Official Code § 2-1831.16(c)-(e), any party suffering a legal wrong or adversely affected or aggrieved by this Order may seek judicial review by filing a Petition for Review and six copies with the District of Columbia Court of Appeals at the following address:

Clerk
District of Columbia Court of Appeals
430 E Street, NW, Room 115
Washington, DC 20001

The Petition for Review (and required copies) may be mailed or delivered to the Court of Appeals, and must be received there within 30 calendar days of the mailing date of this Order, pursuant to D.C. App. R. 15(a)(2). There is a \$100 fee for filing a Petition for Review. Persons who are unable to pay the filing fee may file a motion and affidavit to proceed without the payment of the fee when they file the Petition for Review. Information on petitions for review can be found in Title III of the Court of Appeals' Rules, which are available from the Clerk of the Court of Appeals, or at www.dcappeals.gov.

Certificate of Service

By First Class Mail (Postage Paid):

Jeffery Carithers
8060 13th Street, Apt. 212
Silver Spring, MD 20910

By E-Mail:

Security Officer Management Branch
Metropolitan Police Department

Chevella.harris-rice@dc.gov

Edward.gibson@dc.gov

Anthony.moye@dc.gov

Jon.shelton@dc.gov

I hereby certify that on _____,
2010, this document was caused to be served upon
the above-named parties at the address(es) and by
the means stated.

Clerk/Deputy Clerk